he suffered as a result of the creditors resuming possession of the tractor. The matters raised in the statement of claim in the second action in Malacca would therefore appear to be nothing less than an attempt by the debtor to reopen the main suit in which the debtor filed no defence and made no counterclaim, and judgment in default was entered against him. The debtor's allegation against his former solicitors (that they neglected to file a defence and generally look after his interest) might give him a remedy against them, but does not affect his position vis-a-vis the judgment creditors.

The debtor made no attempt to apply to the court to set aside the default-judgment, though he had plenty of time to do so. That judgment as earlier stated was obtained as long ago as on October 16, 1975; the first bankruptcy notice was issued on April 1, 1976, and after its withdrawal the second bankruptcy notice was not served until February 24, 1977. So there was plenty of time between the judgment and the first notice and also between the two notices in which the debtor could have applied to the court to have the default-judgment in the first action to be set aside; and yet he did not do so.

In our judgment the Malacca action is tantamount to a collateral attack upon a final decision of a court of competent jurisdiction. Since writing this judgment we have come across a decision of the House of Lords on this very point in *Hunter* v. *Chief Constable of the West Midlands Police*[1] where a civil case was started obviously to try and overrule a decision of a criminal court. There Lord Diplock said at page 914:

"My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the present case."

He then cited with approval the following passages as expressing the principle to be followed by the courts:

"... the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court." (*per* A.L. Smith L.J. in *Stepbenson* v. *Garnett* [1898] 1 Q.B. 677, 680-681).

"... I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again." (*per* Lord Halsbury L.C. in *Reichel* v. *Magrath* (1889) 14 App. Cas. 665, 668).

In our judgment, this appeal must be allowed. Accordingly we set aside the learned judge's order and in its place substitute an order that the notice of bankruptcy be restored.

The debtor to pay costs here and below, and the judgment creditors' deposit to be returned to them.

Appeal allowed.

Solicitors: *Nik Hussain, Ibrahim, Tan & Abdullah; Jagjit Singh & Co.*

LOOT TING YEE v. TAN SRI SHEIKH HUSSEIN BIN SHEIKH MOHAMED & ORS.

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.) January 15 & February 19, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 12 of 1981]

Practice and Procedure — Contempt of court — Application for committal for contempt dismissed in High Court and Federal Court — Application for leave to appeal to Yang di-Pertuan Agong — Whether there is right of appeal — Whether decision was one as to effect of Constitution — Whether decision was on a criminal matter — R.H.C. 1980, O. 52 — Courts of Judicature Act, 1964, s. 74(3)(a).

In this case the applicant had applied to the High Court to commit the respondents, who were members of the Education Service Commission, for alleged contempt of court. The application was dismissed in the High Court and in the Federal Court — See [1982] 1 M.L.J. 142. The applicant thereupon applied for leave to appeal to the Yang di-Pertuan Agong.

Held: (1) the decision of the learned judge in this case was in a criminal matter and therefore there is no right of appeal beyond the Federal Court;

(2) the alleged contempt in this case was a criminal contempt consisting of words or acts alleged to obstruct or tending to obstruct or interfere with the administration of justice;

(3) the fact that the application was made under Order 52 of the Rules of the High Court, 1980 and that if committed the respondents would be kept in a civil prison at the expense not of the Government but of the applicant did not make any difference.

Cases referred to:-

(1) *O'Shea* v. *O'Shea and Parnell, ex parte Tuohy* (1890) 15 P.D. 59.

(2) *Ambard* v. *A.G. for Trinidad and Tobago* [1936] A.C. 322.

(3) *Re Abdul Aziz's Application* [1962] M.L.J. 64.

(4) *Public Prosecutor* v. *Lee Ah Keh & Ors.* [1968] 1 M.L.J. 22.

(5) *In re Pollard* (1868) 5 Moore N.S. 111; 16 E.R. 457.

The following cases were also cited in argument: *Lee Chow Meng* v. *Public Prosecutor* [1979] 2 M.L.J. 267; [1979] 1 W.L.R. 1463, 1465; *Amand* v. *Home Secretary and Minister of Defence* [1943] A.C. 147; *Osman bin Mat Isa & Ors.* v. *Superintendent of Prison, Alor Star* [1974] 1 M.L.J. 189.

FEDERAL COURT.

Karpal Singh for the appellant.

Lim Beng Choon (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): This is an application by the appellant for conditional leave to appeal to His Majesty from a judgment of this court.

The appellant is a teacher at Sekolah Rendah Jenis Kebangsaan (China) Naam Kheung, Batu 3½, Jalan Cheras, Kuala Lumpur. He was ordered to go on transfer to Sekolah Rendah Jenis Kebangsaan (China) Chung Hwa, Jerteh, Trengganu. He refused to comply with the transfer order. He appealed to the education authority to cancel the order, but was not successful. On April 11, 1980, the Secretary-General of the Ministry of Education directed him to present himself to the Headmaster of the school in Jerteh as early as possible. He again refused.

On April 14, 1980, he filed a suit in the High Court, Kuala Lumpur, asking for a number of declarations, the main one being a declaration that the purported transfer was void and of no effect. While the suit was still pending the Education Service Commission on June 9, 1980, sent him a notice to show cause why he should not be dismissed from the teaching service. The notice also carried several charges against him relating to acts allegedly in violation of several provisions of the Public Officer (Behaviour and Discipline) Regulations, also known as General Orders Cap. D. The several charges against the appellant are concerned primarily with his not complying with the transfer order and with his subsequent conduct.

On September 29, 1980, the appellant applied to the High Court under Order 52(3) of the Rules of the High Court 1980 to commit the eight members of the Education Service Commission, the respondents, for alleged contempt of court. The grounds for the application for committal can be summarized briefly as follows:—

(1) knowing that there was a pending suit in the High Court for declarations on the purported order of transfer, the respondents had by sending the Notice to show cause prejudged the issues the subject matter of the pending suit;

(2) the action of the respondents clearly interfered with the true course of justice and the lawful process of court;

(3) the actions of the respondents were clearly calculated to hinder the court in the administration of justice, adversely affecting the authority and dignity of the court; and

(4) the action of the respondents clearly prejudiced the merits of the applicant's case pending before the court.

Wan Suleiman F.J. who sat in the High Court to hear the application held:

"that on the score of the restricted scope of publication alone, there cannot be contempt for by no stretch of the imagination can such publication pose any sort of risk of interference with the proper administration of justice. What was called by applicant's counsel publication was in fact intimation to the applicant of charges of a departmental character proposed to be brought against him."

And in another passage of his judgment he said:

"Examined in the light of Lord Diplock's definition of contempt of court cited earlier (i.e. *Attorney-General* v. *Times Newspaper Ltd.* [1973] 3 All E.R. 54) the conduct of the Education Service Commission in relation to the civil suit [which] applicant has filed neither tends to undermine the system for the administration of justice by courts of law and the maintenance of public confidence in it nor does it inhibit citizens from availing themselves of that system for the settlement of their disputes."

On appeal the Federal Court agreed with the learned trial judge.

The appellant being dissatisfied is desirous of appealing further to His Majesty — hence this application for leave to so appeal.

Mr. Lim Beng Choon for the respondents opposed the application on the ground that the decision appealed from was a decision as to the effect of the constitution and therefore barred by section 74(3)(a) of the Courts of Judicature Act. Alternatively he argued that the decision was one relating to a criminal matter and therefore, since the repeal by Act A328 in 1976 of paragraph (c) of subsection (2) of section 74, no longer appealable to His Majesty. Finally he argued that the case was not from its nature a fit one for appeal; but he did not press this last ground.

Mr. Karpal Singh on behalf of the appellant argued that the decision appealed from did not involve interpreting the Constitution. In answer to the alternative argument he said that contempt was a civil matter, for the application to commit the respondents was made under Order 52 of the Rules of the High Court and if the respondents were committed they would be sent to a civil prison and the expenses of their detention would have to be borne by the appellant, not the Government. Lastly he said that this case is from its nature a fit one for appeal within paragraph (iii) of subsection (1) of section 74 and therefore appealable.

Thus the issue here is — whether or not the appellant may appeal beyond the Federal Court.

Clearly if the matter is criminal, he may not.

With respect we are of the opinion that the learned trial judge's decision was in a criminal matter and therefore there is no right of appeal beyond the Federal Court.

In *O'Shea* v. *O'Shea and Parnell, ex parte Tuohy*[1] the Court of Appeal held that an application by a party to a civil action for an attachment against a person not a party to the action, for contempt of court in the publication of comments calculated to prejudice the fair trial of the action, is a "criminal cause or matter" within the meaning of section 74 of the Judicature Act, 1973; and no appeal from an order made upon such application could be brought to the Court of Appeal. There was a divorce suit and application was made by notice of motion for a writ of attachment for contempt of court against Tuohy, for printing and publishing an article calculated to prejudice the petitioner in the divorce suit in the eyes of the public and to discredit him in the assertion of his right in the court. Cotton L.J. said at page 63:

"It is conceded that [what Tuohy did] was a wrongful act, otherwise there could be no fine or imprisonment. And when you concede that it is a wrongful act, you find, although [the motion] is headed in the divorce action, it is not a proceeding in the action...' but an application to punish an attempt to induce the jury not to try the case properly, which is as much a criminal act as an attack upon the judge himself."

In *Ambard* v. *A.G. for Trinidad and Tobago*[2] Lord Atkin delivering the judgment of the Privy Council said at page 329:

"...interferences [i.e. with the administration of justice — whether they be interferences in particular civil or criminal cases] when they amount to contempt of court, are quasi-criminal acts, and orders punishing them should, generally speaking, be treated as orders in criminal cases...."

The Singapore High Court has also held that contempt of court is a criminal matter. In *Re Abdul Aziz's Application*[3] Rose C.J. said at page 65:

"It would seem to be clear that... contempt of court... has long been regarded as a criminal matter. The observations of Lindley L.J. and Lopes J.L. in *O'Shea* v. *O'Shea and*

Parnell, at pages 64 and 65 are in point. As also is an observation of Wills J. in the *King* v. *Parke* (1903) 2 K.B. 441 at page 441 where he says that procedure in matters pending on the civil side 'would afford no assistance in the present discussion'. By this he must clearly be taken to have meant that contempt of court falls on the criminal side of the jurisdiction."

In *Public Prosecutor* v. *Lee Ah Keh & Ors.*[4] Ali J., as he then was, recognized that contempt of court is a criminal offence, certainly if committed in the face of the court. He cited with approval at page 23 the headnote to *In re Pollard*[5] which reads in part as follows:

"A contempt of court being a criminal offence. . . ."

This is not to say however that all contempts are criminal, for, as stated by Halsbury's Laws of England, 4th edition, paragraph 2:

"Contempt of court may be classified either as (1) criminal contempt, consisting of words or acts obstructing, or tending to obstruct or interfere with, the administration of justice or (2) contempt in procedure, otherwise known as civil contempt, consisting of disobedience to the judgments, orders or other process of the court, and involving a private injury."

The alleged contempt here is clearly of the first and not of the second kind.

The fact that the application here was made under Order 52 of the Rules of the High Court, 1980, and that if committed the respondents would be kept in a civil prison at the expense not of Government but of the applicant does not in our judgment make any difference.

As there is no appeal beyond the court, this application is dismissed with costs.

Application dismissed.

Solicitors: Karpal Singh & Co.

KON THEAN SOONG v. TAN ENG NAM

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman Ag. C.J. (Malaya) & Abdul Hamid F.J.) December 3, 1981 & February 20, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 164 of 1979]

Partnership — Retirement of partner — Whether rights and interests of retiring partner sold to the other partner — Whether agreement enforceable — Payment of interest — Civil Law Act, 1956, s. 5(1) — Contracts (Malay States) Ordinance, 1950.

English Law — Whether English Law of partnership applicable — Contracts (Malay States) Ordinance, 1950 — Civil Law Act, 1956, s. 5(1).

In this case the parties were partners in a business. On September 30, 1969 the respondent retired from the business and the business became a sole proprietorship with the appellant as sole proprietor. It was also agreed that the appellant should pay for the respondent's rights and interests in the partnership on the basis of the appellant's sole proprietorship in the business as at March 31, 1970. The respondent claimed the sum due from the appellant and judgment was given in his favour in the High Court. The appellant appealed.

Held: (1) the law applicable in this case was the Contracts (Malay States) Ordinance, 1950. Notwithstanding Section 5(1) of the Civil Law Act, 1956, the English law of partnership will not apply, even if the Contracts Ordinance, 1950, is silent on the issues in dispute;

(2) in this case the learned judge was right in holding that the intention of the parties was clearly expressed in the second recital to the agreement where it was stated that the plaintiff-respondent was desirous of withdrawing from the partnership and to sell his rights and shares in the partnership to the defendant-appellant;

(3) the learned judge was also right in holding that the buying price which the appellant had to pay to the respondent, was based on the financial standing of the appellant's sole proprietorship in the business as at March 31, 1970 and not as on the date of the respondent's retirement on September 31, 1969;

(4) as the appellant in this case had the use of the respondent's share of the money to which the respondent was entitled from April 1, 1970, the learned judge was correct in ordering that interest should be payable from that day.

Cases referred to:-

(1) *Newington Local Board* v. *Cottingham Local Board* (1879) 12 Ch. D. 725.

(2) *Tan Mooi Liang* v. *Lim Soon Seng* [1974] 2 M.L.J. 60.

(3) *Addanki Narayanappa & Anor.* v. *Bhaskara Krishnappa* A.I.R. 1966 S.C. 1300, 1304.

(4) *Forbes* v. *Git & Ors.* [1922] 1 A.C. 256.

FEDERAL COURT.

R.R. Sethu for the appellant.

Khoo Eng Chin for the respondent.

Cur. Adv. Vult.

Wan Suleiman Ag. C.J. (Malaya) (delivering the judgment of the Court): When we dismissed this appeal we undertook to give our reasons in due course. Our grounds are set out hereunder.

The respondent's claim is based on a written agreement Exhibit P1 executed by the parties on September 25, 1969. The agreement is entitled "Agreement of Retirement of a Partner", and before us as it was in the court below the construction of this document is the deciding factor. The facts of this action are not in dispute, and at the trial both parties elected not to call any witness.

The facts are clearly set out in the judgment of the learned trial judge. The parties were partners in a business known as the Times Educational Company from January 1, 1964. On September 30, 1969 the respondent retired from the business. Since the partnership business was registered under the Registration of Business Ordinance 1956, the parties executed Business Registration Form B, whereunder the respondent withdrew from the partnership as from the date of execution i.e. September 30, 1969, and the business became a sole proprietorship business with appellant as the sole proprietor (see Exhibits AB1 and AB2).

At the trial there were two agreed issues:—

(1) Whether on the construction of the Agreement (Exhibit P1), the respondent had retired from the partnership *and sold his rights and interests therein to the appellant* OR whether the respondent retired *simpliciter* from the partnership; (the emphasis is ours).

(2) If the respondent had retired from the partnership and sold his rights and interests therein to the appellant, is such an agreement enforceable?